LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 4 1972
E. ROBERT [illegible] CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-884

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

v.

WILLIAM H. PAT O'BRYAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

HARVEY L. DAVIS,
3315 Daniels,
Dallas, Texas 75205,
REAGAN M. MARTIN,
700 United Fidelity Bldg.,
1025 Elm St.,
Dallas, Texas 75201.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10642 — 1455 ROUND TABLE DRIVE — DALLAS — 631-3130

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

STEPHEN S. CHANDLER, United States District Judge for the Western District of Oklahoma,

Petitioner,

v.

WILLIAM H. PAT O'BRYAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To The Honorable Supreme Court of The United States:

Respondent respectfully urges that the Petition For Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit be denied.

STATEMENT OF THE CASE

Respondent incorporates as his statement of the case, the painstaking, exhaustive statement of the facts set out in the opinion of the Court of Appeals, 445 F. 2d 1045, at

pp. 1047-1051. The Court of Appeals sets out the complete history and factual background necessary to the understanding of the legal issues involved. Petitioner's statement is not factual, is selfserving and fails to state the background necessary to an understanding of the case.

Counsel for petitioner states on page 9 of the petition that he has spent several months in a " * * * sincere effort to prepare a Petition for Certiorari pointing out and documenting by the record the irrelevancy and inaccuracy of the gratuitous statements of the Court of Civil Appeals * * *". However, he concludes that " * * * it would be an imposition on the Court, and obscure the real issues * * *" if he did this. This is an amazing statement to make about the Court of Appeals setting by special designation of this Court. It does not seem that it would be an imposition on this Court if petitioner could point out any irrelevancy, accuracy or gratuitous statements of the Court of Appeals. Rather it was petitioner's duty to do so, if he could. With the delays and extensions of time to file his petition, he has had approximately eight (8) months to show any errors in the opinion either in the facts or the law stated therein. He has not done so, and it is submitted that the statement by the Court of Appeals can be accepted as accurate.

The petition does not mention that Mr. O'Bryan's libel action was a state action based on the libel laws of the state of Oklahoma. (Vol. II, Ex. No. 1.) That action was removed to federal court by petitioner. It was remanded to the state court by Federal District Judge Austin's finding that Judge Chandler's libel was committed outside of his judicial immunity and color of office, and that no federal

issues were involved. (Transcript of Proceedings, April 18, 1966, Vol. III, Ex. No. 23). The remand order by Judge Austin that no federal issues were involved gave the state court jurisdiction to try the libel action based on the laws of Oklahoma. Since the Oklahoma state court had jurisdiction of the libel action, petitioner's declaratory judgment violated the provisions of 28 U.S.C. § 1447(d) because it was an attempt to review the order of Judge Austin remanding the case which order is not reviewable.

It should also be pointed out that the petition attempts to narrow the decision of the Court of Appeals down to only one basis, namely that of federal jurisdiction. But the Court of Appeals gave another basis for its decision as follows:

> "Thus we conclude that there was no federal jurisdiction of the declaratory judgment action, and the judgment would have to be reversed on those grounds alone. *However, even assuming that sufficient jurisdiction had been shown, we think the order must be reversed for the reason that it was an improper interference with the state court's jurisdiction.*" (445 F. 2d at 1057) (emphasis supplied.)

REASONS FOR DENYING WRIT

1. The decision of the Court of Appeals is correct so there is no need for review.

2. There is no jurisdiction in the Federal District Court for petitioners declaratory judgment action and the petition fails to point out any valid basis for jurisdiction.

3. The petition fails to show why petitioners' declaratory judgment action is not an improper interference with the Oklahoma state court's jurisdiction.

This response rests primarily on the opinion of the Court of Appeals sitting by designation of this Honorable Court, reported at 445 F. 2d 1045 and perhaps attached as Appendix A to the Petition. (No appendices of any kind were attached to the copies of the petition furnished respondent.)

The petition does not show any reason or authority to question the correctness of the decision of the Court of Appeals. The petition does not give this Court any valid legal reason to review the decision of the Court of Appeals. It can be said that the essence of the petition is that Judge Chandler should have judicial immunity, regardless of the acts of libel he has committed, because he is a Federal Judge. The petition in effect, asks this Court to ignore all the facts, reasons and authority set out in the opinion of the Court of Appeals when it rejected similar arguments by petitioner.

The Court of Appeals correctly held there is no federal jurisdiction. In order to bring a case under the Declaratory Judgment Act, a plaintiff must fit his case within one of the jurisdictional statutes because the Declaratory Act is not of itself a jurisdictional statute. The Act is procedural in nature and neither augments nor diminishes the jurisdiction of the federal courts. *Skelly Oil Company v. Phillips Petroleum Company*, 339 U.S. 667 (1950). The only jurisdictional statute relied upon is 28 U.S.C.A., § 1331. It is only by very agile bootstrap lifting that petitioner has managed to create the appearance of Federal jurisdiction.

It is beyond dispute that the subsequent libel action does not violate the malicious prosecution judgment. Based on

the record it is shown as a matter of law that the judgment of the Court of Appeals in the malicious prosecution action related to a tort committed by Chandler on November 9, 1961. The judgment for Judge Chandler that he was judicially immune for his November 9, 1961, tortuous act is complete, final, and impregnable (Plaintiff's Exhibits 12 and 13, and 13 Supplement). That final judgment cannot possibly be violated by the subsequent libel action based upon the separate tort committed by Judge Chandler on August 15, 1965, a period of almost four years since the commission of his first tort.

This is an attempt to get a declaratory judgment that will render void the judgment of a state court. The Federal Trial Court had no jurisdiction of this suit brought by Judge Chandler claiming that the state court erred in deciding that he had no judicial immunity when he committed his libel against Mr. O'Bryan. *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923). The Federal Trial Court has no original jurisdiction to reverse or modify a state court judgment. *Hanna v. Home Insurance Company*, 281 F. 2d 298 (5th Cir. 1960); *cert. den.* 365 U.S. 838. A federal district court has no jurisdiction of suits to nullify state court judgments. This is the law even though the action is based on the presence of a federal question. *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 396 U.S. 1201 (1970); *Manufacturers Record Publishing Company v. Lauer*, 168 F. Supp. 234 (D. C. La. 1959); affirmed 268 F. 2d 187; *cert. con.* 361 U.S. 913.

The method utilized in the summary judgment declaratory judgment action was an abuse of the Declaratory

Judgment Act, Title 28 U.S.C.A., § 2201. The Supreme Court has declared that the Act is procedural in nature. *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227 (1937). The Act creates no substantive rights. *McCarty v. Hollis*, 120 F. 2d 540 (10th Cir. 1941). Petitioner is attempting, under an act that is procedural in nature, to wipe out the substantial rights of Mr. O'Bryan in his cause of action for libel. Petitioner is also using this act, procedural in nature, to create in himself a substantive right to wipe out and eliminate Mr. O'Bryan's substantive judgment that was won on the merits in the Oklahoma State Court.

The Declaratory Judgment Act looks to the future in the sense that it seeks to adjudicate and determine rights and liabilities, procedurally, so as to avoid *future* controversies and lessen damages and expenses.

Petitioner is attempting to utilize the Declaratory Judgment Act, a procedural act, to determine the substantive law question of judicial immunity. Moreover, he is attempting to use this procedural act to pass on the substantive question of judicial immunity which has already been heard by a federal court in all of the pertinent aspects that were *again* presented to the trial court.

The *only* case authority cited in the entire petition is on page 11 where part of a sentence from the opinion of the Court of Appeals is quoted as follows: "It is true that the immunity issue is a federal question. Howard v. Lyons, 360 U.S. 593, 597 (1959) * * *." The entire sentence by the Court of Appeals is as follows:

> "It is true that the immunity issue is a federal question, Howard v. Lyons, 360 U.S. 593, 597, 79 S. Ct. 1331, 3

L. Ed. 2d 1454 (1959), *but it is in the nature of a federal defense to a suit instituted under state law. As such, it is not sufficient to convey original jurisdiction on a federal court.*" (Emphasis supplied)

Petitioner presented his federal defense of judicial immunity in Judge Austin's Federal District Court and then in the Oklahoma state court trial on the merits. That defense was found not valid in both courts.

Petitioner's "Reasons For Granting The Writ" Have No Validity And Are Not Supported By Authority

Under petitioner's "Reasons For Granting The Writ" five items are listed. These five items are not five different reasons for granting the writ. None of the listed items have validity.

The first reason stated that the question decided by the Court of Appeals involves the narrow federal question of the jurisdiction of the United States District Court in a declaratory judgment action to entertain and determine the question of the judicial immunity of a federal judge for "official" acts performed by him. This does not accurately state the basis for the Court of Appeals opinion. Most importantly it omits the fact that Federal District Judge Austin in the first removal, remanded the case after he determined that the libel committed by Judge Chandler was not an *official* act performed by him. The trial on the merits in the Oklahoma State court also found the libel by Judge Chandler was not done under his judicial immunity.

It is next stated that this important federal question should be settled by this Court and that the decision of the Court of Appeals appears to be directly contrary to the

relevant decisions of this Court. No relevant decision of this Court was cited anywhere in the petition.

It is next stated that the decision of the Court of Appeals is in conflict with the relevant decision of all other courts of appeal on the same matter. No decisions are cited anywhere in the petition to support this statement.

It is next stated there is no rule of law or adjudicated case to sustain it. (The Court of Appeals decision) This statement has no validity because the opinion of the Court of Appeals is replete with statements of rules of law and adjudicated cases sustaining its opinion.

And finally, it is stated that if the Court doesn't grant certiorari the petitioner will be required to go through the ordeal of a state court trial, appeal to the State Supreme Court and then bring the matter here for final decision. This contains a misstatement because the state court trial has already been completed. As the Court of Appeals pointed out and as this Court has also pointed out in *Public Service Commission v. Wycoff*, 344 U.S. 237, petitioner should attempt review of the state court trial in the Oklahoma Supreme Court and then, if desired, petition for certiorari to the Court for review. That is the proper and legal way to attain the ultimate decision on the merits.

THE PETITION FAILS TO DISCUSS THE ISSUES

The petition fails to meet and answer the legal issues that are raised in this cause and dealt with in the opinion below. It is of extreme significance to note what the peti-

tion fails either to mention or adequately discuss. It fails to discuss:

1. The trial before the Honorable Richard B. Austin on the first removal and remand of the libel action where all of the legal issues raised by this declaratory judgment action were considered and passed on. The Court of Appeals found on the record this to be true. (445 F. 2d at page 1054)

2. The petition fails to deal with the issue of whether the record in the libel action presented to the Honorable Judge Battisti in the second removal and motion for remand action was before the Honorable Judge Austin in the first removal and remand trial. The Court of Appeals found on the record that Judge Austin had previously considered all the matters passed on by Judge Battisti (445 F. 2d at page 1054).

3. The petition fails to mention or discuss why the decision of Judge Austin holding that the libel committed by Judge Chandler against Mr. O'Bryan was not performed by Judge Chandler officially in his capacity as a United States judge or under the color of the office of a United States judge and that no federal issues were involved, is or is not *res judicata* and therefore a conclusive legal bar to the very same issues raised by Judge Chandler in his declaratory judgment action. The Court of Appeals held Judge Austin's decision is res judicata as to the issue of the forum (445 F. 2d at 1057).

4. The petition does not mention or discuss the issue of whether this declaratory judgment action is a disguised attempt to obtain a review of Judge Austin's remand order.

5. The petition does not mention or discuss the issue of whether the libel action against Judge Chandler could be merged in the holding by the 10th Circuit Court of Appeals in *O'Bryan v. Chandler*, 352 F. 2d 987 (1965), that Judge Chandler's actions in the prior mali-

cious prosecution action were judicially immune in view of the undisputed fact that the 10th Circuit Court of Appeals was completely unaware of Judge Chandler's actions in committing the libel at the time the Court wrote its opinion in *O'Bryan v. Chandler*, 352 F. 2d 987 (1965). The Court of Appeals found from the record the Court writing the opinion in 352 F. 2d 987 was completely unaware of Judge Chandler's libelous actions. (445 F. 2d at pages 1054, 1055)

6. The petition does not meet the issue of whether Federal District Court wrongfully issued writs of mandamus and prohibition to the Oklahoma state court as has been repeatedly held in many federal cases, the latest one being *Atlantic Coast Line R. Co v. Brotherhood of Locomotive Engineers*, 396 U.S. 1201 (1970).

A trial on the merits of the libel action against petitioner has been held in the state court of Oklahoma. (Vol. II, Ex. No. 17) In that trial it was found that his libelous statements were made outside the broad limits of his judicial immunity. An appellate review of the decision in that state court case can only be had by an examination of the certified record of the proceedings in the trial on the merits. Petitioner has not brought forward the certified record of that trial. His proper method is to bring that record by appeal before the Oklahoma Supreme Court and ultimately by writ of certiorari to this Court if the Oklahoma Supreme Court rules against him. This is the route that petitioner should have followed after the state court trial on the merits almost five years ago. (Feb. 20-25, 1967, Vol. II, Ex. No. 17) His tactics in preventing a final decision on the merits of this matter for five years is a reprehensible abuse of the judicial process. We urge this Honorable Court to deny this petition and if possible issue orders that put an end to peti-

tioners delaying dilitory tactics in interfering with the Oklahoma State Courts jurisdiction.

CONCLUSION

By reason of the foregoing, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Harvey L. Davis
3315 Daniels,
Dallas, Texas 75205

Reagan M. Martin
700 United Fidelity Bldg.
1025 Elm St.
Dallas, Texas 75201